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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 778

NEW JERSEY WORSTED MILLS, PETITIONER

v.

OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES AND FEDERAL TRUST COMPANY, EXECUTORS OF THE WILL OF EDWARD E. GNICHTEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of New Jersey (R. 44–51) is reported in 31 F. Supp. 908. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 131–140) is reported in 116 F. (2d) 338.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 9, 1940. (R. 140.) The

petition for a writ of certiorari was filed February 21, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Commissioner of Internal Revenue granted taxpayer's application for special assessment of its excess profits tax liability for the years 1918 and 1919 and made refunds pursuant to Section 210 of the Revenue Act of 1917 and Sections 327 and 328 of the Revenue Act of 1918. The question is whether the Commissioner may thereafter, within the period of limitations, correct his determinations and assess excess profits tax deficiencies equal to all or a part of the money refunded.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–21.

STATEMENT

The facts were stipulated (R. 52–130) and those presently material may be summarized as follows:

The taxpayer is a New Jersey corporation. The original defendant, Edward E. Gnichtel (hereinafter called the "Collector"), was at all times important for the purposes of this action Collector of Internal Revenue for the Fifth District of New Jersey. After the institution of this action Gnich-

tel died; respondents are the executors under his will.

The taxpayer filed its income and excess profits tax returns for the years 1918 and 1919 under the Revenue Acts of 1917 and 1918, respectively, and paid the taxes due as shown thereon. Thereafter it applied to the Commissioner of Internal Revenue for a redetermination of its excess profits taxes for each of the two years upon the basis of the relief provisions contained in Section 210 of the Revenue Act of 1917 and Sections 327 and 328 of the Revenue Act of 1918. (R. 52–54.)

The Commissioner granted the taxpayer's application and, as a result of a special computation, determined an overassessment for each of the years in question in a substantial amount. The decision was communicated to the taxpayer by letter from the Commissioner dated April 7, 1923, and the amounts of the overassessments were refunded with interest. (R. 54.)

By letter of March 25, 1924, the Commissioner advised the taxpayer that the redetermination of its profits tax liability was erroneous and that a recomputation of the taxes for 1918, under the relief provisions, and for 1919, under the ordinary provisions of the pertinent Revenue Acts, disclosed an additional tax liability for each year, for which assessments against the taxpayer were made immediately. Following the Commissioner's formal rejection of a claim for abatement of

the additional assessments, the taxpayer petitioned the Board of Tax Appeals for a review of the Commissioner's decision. The Commissioner filed a plea in bar challenging the jurisdiction of the Board on the ground that the taxes in controversy had been assessed prior to the passage of the Revenue Act of 1924 which created the Board of Tax Appeals. The Board subsequently entered an order dismissing the petition for lack of jurisdiction. The taxpayer did not petition for a court review of the Board's decision. (R. 54–57.)

The taxpayer paid the additional assessments, using for this purpose, with the Commissioner's approval, a tax credit in favor of a wholly owned subsidiary (Gera Mills) and a check to the order of the Collector for the balance. The taxpayer filed claims for refund of the additional taxes, to which the Commissioner responded in due course, stating that a further computation of the taxpayer's tax liability for the year 1918 under the relief provisions of the Revenue Acts developed an overpayment of taxes by the taxpayer for that year but that the application for a special assessment for the year 1919 had been properly disallowed. The overassessment for 1918 was refunded to the taxpayer with interest and the claim for refund for 1919 was formally rejected (R. 57–59; 116–123).

The present action was instituted for the recovery of the net amount of profits taxes paid by

the taxpayer for the years 1918 and 1919, over and above the Commissioner's original special assessments. Pursuant to cross-motions for summary judgment (R. 40–42, 43–44), the District Court decided that the Commissioner had power to make a redetermination under the special assessment provisions of the Revenue Acts of 1917 and 1918 and that such a redetermination, like an original determination pursuant to those provisions, was not subject to review by the courts. Accordingly, judgment was entered for the respondents and the taxpayer appealed (R. 44–51). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 140).

ARGUMENT

1. Section 210 of the Revenue Act of 1917 (*infra*, p. 13) and Sections 327 and 328 of the Revenue Act of 1918 (*infra*, pp. 14–15) authorize the Commissioner, in his discretion, to make a special computation of excess profits taxes in certain situations where application of the ordinary excess profits tax provisions is not feasible or would work hardship. The Commissioner's determination as to whether the special computation is warranted, as well as the special computation itself, are not subject to review by the courts. *Williamsport Co.* v. *United States*, 277 U. S. 551; *Duquesne Steel Foundry Co.* v. *Commissioner*, 41 F. (2d) 995 (C. C. A. 3rd), affirmed *per curiam*, 283 U. S. 799.

The issue here is simply whether, after the Commissioner has determined that a special computation is warranted and has made such a special computation, he may within the period of limitations alter that determination and either disallow the special computation entirely or change the actual computation previously made. This question is not peculiar to Section 210 of the 1917 Act and Sections 327 and 328 of the 1918 Act, since the statutory procedure for the assessment and collection of income and excess profits taxes is the same, whether special computation is allowed or the ordinary provisions are applied.

The revenue statutes themselves clearly indicate the answer to the question. Section 3229 of the Revised Statutes, in effect prior to 1921, provided for the binding compromise of a tax controversy by the Commissioner with the approval of the Secretary of the Treasury. For the first time in the 1921 Act there appeared, as Section 1312 (*infra*, p. 20), a "closing agreement" provision for giving binding effect to any determination and assessment, whether followed by payment of a deficiency, or refund or credit. Such an agreement made by the Commissioner must, like an offer in compromise, receive the approval of the Secretary of the Treasury. The clear implication from these express provisions for securing a determination binding upon the Commissioner is that a determination, such as that here involved, which is not embodied in a compromise or in a closing agree-

ment, is not binding until the running of the period of limitations makes it so.

With the exception noted below, this has been the consistent ruling of the courts. *Botany Mills* v. *United States,* 278 U. S. 282; *Burnet* v. *Porter,* 283 U. S. 230, which expressly approved the analysis of the Circuit Court of Appeals for the Third Circuit in *McIlhenny* v. *Commissioner,* 39 F. (2d) 356; *Sharpe* v. *Commissioner,* 107 F. (2d) 13 (C. C. A. 3d), certiorari denied, 309 U. S. 665; *L. Loewy & Son* v. *Commissioner,* 31 F. (2d) 652 (C. C. A. 2d); *Holmquist* v. *Blair,* 35 F. (2d) 10, 12–13 (C. C. A. 8th); *Oak Worsted Mills* v. *United States,* 36 F. (2d) 529 (C. Cls.), new trial denied, 38 F. (2d) 699, certiorari denied on this point, 281 U. S. 717, affirmed on other grounds, 282 U. S. 409; *Taft Woolen Co.* v. *United States,* 38 F. (2d) 704 (C. Cls.), certiorari denied on this point, 281 U. S. 717, affirmed on other grounds, 282 U. S. 409; *Page* v. *Lafayette Worsted Co.,* 66 F. (2d) 339 (C. C. A. 1st), certiorari denied, 290 U. S. 692; *Austin Co.* v. *Commissioner,* 35 F. (2d) 910 (C. C. A. 6th), certiorari denied, 281 U. S. 735; *Levy* v. *Commissioner,* 48 F. (2d) 725 (C. C. A. 9th); *Baumgartner* v. *Commissioner,* 51 F. (2d) 472 (C. C. A. 9th); *Champ Spring Co.* v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852.

Woodworth v. *Kales,* 26 F. (2d) 178 (C. C. A. 6th), relied upon by the petitioner, is to the con-

trary. The *Kales* case, however, antedated all of the decisions cited above, and has plainly been overruled. The subsequent decision of the Circuit Court of Appeals for the Sixth Circuit in *Austin Co.* v. *Commissioner,* in effect reverses the result of the *Kales* case. It is significant that in *Oak Worsted Mills* v. *United States, Taft Woolen Co.* v. *United States, Page* v. *Lafayette Worsted Co.,* and *Austin Co.* v. *Commissioner,* all *supra,* which are direct authority in support of the decision below, petitions for writs of certiorari were denied despite asserted conflict with the *Kales* case.

Petitioner relies on the holding in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, reiterated in *Daube* v. *United States,* 289 U. S. 367, 370, that a certificate of over-assessment issued by the Commissioner creates an account stated and may give rise to a new cause of action with a new term of limitations. That holding is in no way inconsistent with the decisions above cited, since the mere existence of an account stated does not give finality to the Commissioner's action. As pointed out in *Daube* v. *United States, supra,* at 371, quoting from *United States* v. *Kaufman,* 96 U. S. 567, 575, such an "account stated" is valid only until "impeached for fraud or mistake." Since the Commissioner may impeach for mistake an "account stated" represented by a certificate of over-assessment, he may on like principle assess a deficiency despite an earlier refund, upon determination that

the refund was erroneously made. The ruling in the *Bonwit Teller* case, made in connection with the running of the period of limitations, is "not to be extended through an enlargement of the concept of an account stated by latitudinarian construction." *Daube* v. *United States, supra,* at 373. It certainly has no direct application here for this is a suit against the Collector and an action on an account stated does not lie against the Collector. *Moses* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743.

Little need be said concerning the numerous cases cited by petitioner (Pet. 5, 8) for the proposition that an administrative decision finally made is irrevocable and may not be reopened or revised even though the statutory limitation period has not expired. The obvious differences between those cases and the present one are adequately discussed in the opinion below (R. 137–138). None of them involved statutory provisions comparable to those here involved.

2. There is no merit in petitioner's contention that it has been denied due process of law. The correction or reversal of an assessment, though annoying and perhaps, at times, financially embarrassing to the taxpayer, is *per se* no denial of due process. Cf. *Botany Mills* v. *United States,* 278 U. S. 282; *Burnet* v. *Porter,* 283 U. S. 230, and other cases cited with them at p. 7, *supra.* When in the instant case the petitioner requested special

assessment and received a refund, it knew, or should have known, in view of Section 1312 of the 1921 Act then in force, that unless a closing agreement was obtained, a correction or reversal of the Commissioner's determination was possible. If there is any hardship in the Commissioner's reassessment, it lies only in the lack of a right to court review; in this respect, the hardship is no more severe than it is with respect to the Commissioner's original action on an application for special assessment, which is also not subject to judicial review. Cf. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502.

Two reasons conclusively demonstrate that petitioner can point to no unconstitutional confiscation. In the first place, the right to court review was voluntarily abandoned by the petitioner when it requested special assessment. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 87–88; *Michigan Iron & Land Co.* v. *United States*, 10 F. Supp. 563 (C. Cls.); *Central Iron & Steel Co.* v. *United States*, 6 F. Supp. 115 (C. Cls.), certiorari denied, 293 U. S. 563. In the second place, the purpose of the special assessment provisions is to relieve taxpayers from hardship which would be imposed by the fixed rates and provisions generally applicable; in other words, it involves a special dispensation or bounty. In the instant case, the final result of the Commissioner's actions was to reduce peti-

tioner's excess profits tax liability for 1918 by some $320,000 below the usual rates, and to leave the usual rates in effect for 1919. As this Court said in *Lynch* v. *United States,* 292 U. S. 571, 577:

> Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right.

Since the taxpayer had no vested right in the special dispensations granted by the original exercise of the Commissioner's discretion, it could not complain of a violation of constitutional right when those bounties were subsequently wholly or partly withdrawn. *Lynch* v. *United States, supra; Frisbie* v. *United States,* 157 U. S. 160, 166.

3. There is an additional ground to support the decision below which the court did not feel called upon to consider. The entire amount claimed for the year ending March 31, 1918, and all but $55,498.85 of the amount claimed for the year ending March 31, 1919, was paid by a tax credit belonging to Gera Mills, a subsidiary of the taxpayer (R. 57, 116–119). This Court has specifically held that the Collector is not liable for taxes so collected. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. Obviously, the Collector must make proper book entries when a credit is authorized by the Commissioner, since the Collector keeps the taxpayer's account. But, unlike a cash collection, this involves "a mere ministerial act,

[which] could subject the collector to no personal liability." *Lowe Bros. Co.* v. *United States, supra,* at 306. The credit instructions given the Collector in the instant case (R. 126–127) left only ministerial acts to be performed.

The Collector here did not, as in *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276, make the original collection of the taxes and consequently no cause of action could be stated against him for the original overpayment. And in view of the *Lowe Bros. Co.* decision, none could be stated against him for the alleged overpayment which resulted from the credit. See also *Routzahn* v. *Reeves Bros. Co.,* 59 F. (2d) 915 (C. C. A. 6th), certiorari denied, 287 U. S. 650.

CONCLUSION

There is no real conflict of decisions, and the decision below is plainly correct. The petition should therefore be denied.

Respectfully submitted.

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MARCH, 1941.